COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ADOPTION OF INTERCONNECTION AGREEMENT BETWEEN SOUTH CENTRAL RURAL TELEPHONE COOPERATIVE CORPORATION, INC. AND SPRINT COMMUNICATIONS COMPANY, L.P.	)))))	CASE NO. 2008-00477

O R D E R

On November 17, 2008, Windstream Communications, Inc. ("Windstream") filed with the Commission its request to adopt the interconnection agreement ("Agreement") between South Central Rural Telephone Cooperative Corporation, Inc. ("South Central") and Sprint Communications Company, L.P. ("Sprint"). That Agreement was negotiated pursuant to 47 U.S.C. §§ 251 and 252 and was approved by this Commission with an effective date of June 1, 2006 and a term of two years. The Agreement expired on June 1, 2008; however, Sprint and South Central operate under the Agreement pursuant to a 90-day "evergreen" term.[1]

South Central objects to the adoption of the Agreement on two grounds: (1) the agreement is not available for adoption under the 1996 Telecommunications Act;[2] and (2) Windstream's request does not constitute a "bona fide" request within the meaning

[1] December 23, 2008 letter from Edward T. Depp to Stephanie Stumbo at 1.

[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

of the 1996 Telecommunications Act.[3] South Central argues that, as a matter of law, the "reasonable period of time," as provided for in 47 C.F.R. § 51.809(c), to adopt the agreement has expired because the Agreement itself has expired.[4] Likewise, South Central argues that through the requested adoption Windstream is acting as a straw man to expand the territory of Windstream Kentucky East, LLC, an incumbent local exchange carrier ("ILEC") and, thus, its request is not a bona fide request.[5]

Windstream asserts that South Central has no basis upon which to object to the adoption of the agreement. First, Windstream argues that, although the original term of the Agreement expired on June 1, 2008, because the parties still have been operating under the Agreement even after its expiration pursuant to the "evergreen" term, the Agreement is still available for adoption.[6] According to Windstream, until the Agreement is terminated and subject to renegotiation, it is available for adoption.[7] Second, Windstream argues that it is making a bona fide request to adopt the Agreement in its own right as a competitive local exchange carrier and not on behalf of the Windstream ILEC.[8]

DISCUSSION

There are three methods by which a requesting telecommunications carrier may achieve interconnection via an interconnection agreement with a local exchange carrier

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[3] *Id.* at 2.

[4] *Id.* at 1.

[5] *Id.*

[6] January 13, 2009 letter from Mark Overstreet to Jeff Derouen at 2.

[7] *Id.*

[8] *Id.* at 3.

("LEC"): (1) pursuant to 47 U.S.C § 252(a), by which the parties file a negotiated agreement with the Commission for approval; (2) pursuant to 47 U.S.C. § 252(b), by which the Commission arbitrates the terms of the agreement; or (3) pursuant to 47 U.S.C. § 252(i), whereby a requesting telecommunications carrier may adopt or "opt-in" to an existing interconnection agreement that a LEC has with another carrier. In the current case, Windstream seeks to exercise its right under 47 U.S.C. § 252(i) to adopt the Agreement between South Central and Sprint. 47 U.S.C. § 252(i) provides:

> A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier under the same terms and conditions as those provided in the agreement.

This right appears to be limitless. However, the Federal Communications Commission ("FCC") has placed limitations on the ability to opt into an interconnection agreement. Particularly, 47 C.F.R. § 51.809(c) provides that:

> Individual agreements shall remain available for use by telecommunications carriers pursuant to this section for a reasonable period of time after the approved agreement is available for public inspection under section 252(h) of the Act.

(Emphasis added.) Federal Courts have recognized these limits as well:

> The right to adopt an existing interconnection agreement contains several limitations, one of which is time. Under a regulation promulgated by the Federal Communications Commission (FCC), an entrant seeking to adopt an approved agreement must do so within "a reasonable period of time after the approved agreement is available for public inspection," 47 C.F.R. § 51.809(c), which is to say a reasonable time after the state commission has approved the underlying agreement, 47 U.S.C. § 252(e)(1), (h).[9]

[9] *BellSouth Telecommunications v. Universal Telecom, Inc.*, 454 F.3d 559, 560 (6th Cir. 2006). *See also*, *Global NAPs, Inc. v. Verizon New England, Inc.*, 396 F.3d 16, 26 (1st Cir. 2005) ("The FCC regulation 47 C.F.R. § 51.809 itself rejects . . . [the] premise that § 252(i) grants an unconditional right to CLECs to adopt the terms of any interconnection agreement the ILEC has with another CLEC.")

The FCC has not provided a specific definition for "reasonable period of time" for the adoption of an interconnection agreement. The United States Court of Appeals for the Sixth Circuit acknowledged this as well: "[t]he FCC, to our knowledge, has yet to construe 'reasonable' period of time under § 51.809(c) . . . ."[10].

In discussing the standard for a reasonable period of time, the FCC has stated:

> We agree with those commentators that suggest agreements remain available for use by requesting carriers for a reasonable amount of time. Such a rule addresses incumbent LEC concerns over technical incompatibility, while at the same time providing requesting carriers with a reasonable time during which they may benefit from previously negotiated agreements. In addition, this approach makes economic sense, since the pricing and network configuration choices are likely to change over time, as several commentators have observed. Given this reality, it would not make sense to permit a subsequent carrier to impose an agreement or term upon an incumbent LEC if the technical requirements of implementing the agreement have changed.[11]

The language of the First Report and Order suggests interconnection agreements are not available for adoption for the entire life of the interconnection agreement. In *Bell Atlantic Delaware v. Global NAPs South, Inc.*, 77 F.Supp.2d 492 (D. Del. 1999), the Court, in discussing the issue of a carrier's right to adoption, noted the FCC's recognition that interconnection agreements are time-sensitive contracts and that it would be unfair to extend the terms of the existing agreement beyond the time frame

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[10] *Universal Telecom*, 454 F.3d 559, 564.

[11] *First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications of 1996*, FCC 96-325, CC Docket Nos. 96-98 and 95-185 (rel. August 8, 1996), at ¶ 1319 ("First Report and Order").

agreed upon by the original parties.[12] The FCC has also concluded that "the carrier opting-into an existing agreement takes all the terms and conditions of that agreement (or portions of that agreement), including its original expiration date."[13] The FCC, in *Global NAPs*, "expressly rejected GNAPs' suggestion that termination dates of existing agreements can be modified for the purposes of § 252(i) opt-in agreements."[14]

In the case at bar, it is undisputed that the original term of the Agreement expired on June 1, 2008. According to South Central, the Agreement continues in effect between the two parties due to an "evergreen" clause in the contract. This clause, Section 2.2 of the Agreement, provides that:

> Either Sprint or SCRTS may terminate the Agreement effective upon the expiration of the Initial Term or effective upon any date after expiration of the Initial Term by providing written notice of termination at least ninety (90) days in advance of the date of termination.

Thus, while the Agreement might still be in effect between Sprint and South Central, it is guaranteed to be effective, at best, for only 90 days at a time.

The Commission has not addressed what a "reasonable period of time is," nor, to the best of the Commission's knowledge, are there state regulations or standards applicable to this situation. The Commission, however, has the power, generally, to determine if 47 C.F.R. § 51.089 allows Windstream's petition. We find that it does not.

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[12] *Id.* at 503.

[13] *In re: Global NAPs South, Inc. Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Regarding the Interconnection Dispute With Bell Atlantic-Virginia, Inc.*, CC Docket No. 99-198, ¶ 8 (August 5, 1999) ("*Global NAPs*") (emphasis added).

[14] *Global NAPs South*, 77 F.Supp.2d at 503.

If the FCC had intended the right to "opt-in" to be open-ended, it would not have put a "reasonable period of time" restriction on when interconnection agreements must be made available for adoption. The FCC did not write 47 C.F.R. § 51.809 to require that all effective interconnection agreements be made available for adoption. The FCC also did not require that every interconnection agreement, whether effective or not, be made available for adoption. The "reasonable period of time" requirement, however, must have some meaning, or its inclusion would be superfluous.[15] To allow the adoption of an interconnection agreement after its expiration date has come and gone would render utterly meaningless the "reasonable period of time" requirement, as it could then be construed to allow the adoption of any interconnection agreement formed since the 1996 Telecommunications Act was enacted.

Interconnection agreements are "time-sensitive contracts,"[16] and the "reasonable period of time" approach "makes economic sense, since the pricing and network configuration choices are likely to change over time."[17] South Central and Sprint entered into the Agreement on June 1, 2006; since then, the relative positions of the parties may change, and likely have changed, as have the network arrangements. Merely because the parties have not provided the 90 days' notice to cancel the Agreement does not mean that the positions of the parties have not changed or could not change upon 90 days' notice. It seems neither economical nor equitable to allow

[15] *Sensus verborum est anima legis. Lat.* The meaning of words is the spirit of the law.

[16] *Global NAPs South*, 77 F.Supp.2d at 503.

[17] *First Report and Order*, ¶ 1339.

Windstream to opt-in to the Agreement at this late (past) hour and avail itself of possibly outdated pricing and network configurations.

Moreover, we agree with the FCC that when a competitor adopts an interconnection agreement, it adopts the interconnection agreement's "original expiration date."[18] Because the original expiration date of the Agreement has come and gone, and Windstream can only adopt the original expiration date, Windstream is barred from adopting the Agreement, as the Agreement is expired to all but Sprint and South Central.

We conclude that "a reasonable period of time" in which to adopt an interconnection agreement expires, at the very least, when the original expiration date has passed.[19] We do not seek to imply that all other interconnection agreements are available for adoption as long as the original expiration date has not passed. We decline to establish a bright-line rule as to what constitutes a reasonable period of time. The Sixth Circuit, discussing the "reasonable period of time" held that: "'[r]easonable' plainly is a relative term, dependent on context and circumstances . . . ."[20] In the future we will also apply such an approach.

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[18] *Global NAPs* at ¶ 8.

[19] There may be exceptions, in extreme circumstances, when an interconnection agreement may be adopted without adopting the original expiration date. For example, in Case No. 2007-00255, *Adoption By Nextel West Corp. of the Existing Interconnection Agreement By and Between BellSouth Telecommunications, Inc. and Sprint Communications Company Limited Partnership, Sprint Communications Company L.P., Sprint Spectrum L.P.* (Order on Rehearing entered on February 18, 2008), the Commission allowed Nextel to adopt an interconnection agreement between Sprint and AT&T Kentucky when the original expiration date had been extended beyond its original date. However, the effective term of the interconnection agreement was extended for two years by FCC order. It is for reasons such as this the Commission declines to adopt a bright-line rule.

[20] *Universal Telecom, Inc.*, 454 F.3d at 564.

Pursuant to 47 U.S.C. § 251(i), and 47 C.F.R. § 51.809(c), the Commission finds that Windstream's request should be rejected as the request for adoption was not made within a reasonable period of time. The Commission, having been otherwise sufficiently advised, HEREBY ORDERS that:

1. The request of Windstream to adopt the interconnection agreement between South Central and Sprint is denied.

2. This is a final and appealable Order.

By the Commission

ENTERED
MAR 26 2009
KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:

Executive Director

Daniel Logsdon
Vice President-External Affairs
Windstream Communications
130 West New Circle Road
Suite 170
Lexington, KY 40505

Max Phipps
Manager
South Central Rural Telephone Cooperative
1399 Happy Valley Road
P. O. Box 159
Glasgow, KY 42141-0159

Honorable John E Selent
Attorney at Law
Dinsmore & Shohl, LLP
1400 PNC Plaza
500 West Jefferson Street
Louisville, KY 40202